

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3680 OF 2004

1. Nishad Sadashiv Pawar
Residing at C-204, Awantika
Apartment, Rajaji Path, Mhatre
Nagar, Near Madhavi Bungalow,
Dombivli (E), Tal. Kalyan,
Dist. Thane Pin 421 201.

2. Anita Ashok Jogalekar,
Residing at 7-A, Madhu Milind
Society, Mahatma Phule Road,
Naupada, Thane (West),
Pin 400 602.

3. Vidya Shashikant Chavan,
Residing at Deep Jyoti Apartment,
403/4th Floor, Kisan Nagar No. 1,
Wagle Estate, Thane 400 604.

4. Uttara Arun Joshi,
Residing at 107, MOti Mahal,
Sane Guruji Nagar, 90 Feet Road,
Mulund (East), Mumbai 400 081.

5. Prakash Mangatram Rohra,
Residing at Block No. 275, Room No. 4,
Near Jhulelal Mandir,
Ulhasnagar 421 002.

... Petitioners

Vs.

1. Dnyanasadhana College,
(Through Honorary General Secretary),

2. The Principal,
Dnyanasadhana College,
Both having their office at Municipal
School No. 18, Behind TELCO,
Off Highway, Thane 400 604.

3. Deputy Director of Education,
Nashik Division, Nashik.

4. State of Maharashtra,
through its Department of Education &
Employment, Mantralaya Annexe,
Mumbai 400032.

... Respondents

Mr. Mihir Desai for Petitioner.

Mr. R.S. Apte i/by M.S. Lagu for R. Nos. 1 and 2.

Mrs. S.S. Bhende, A.G.P. for R. Nos. 3 and 4.

CORAM : F.I. REBELLO &
S.P. KUKDAY,JJ.
DATED : FEBRUARY 25, 2005

ORAL JUDGMENT (Per F.I. Rebello,J.):

. Rule. Heard forthwith.

. It is not necessary to set out the facts in detail in view of the order to be passed. It appears from the record that the petitioners Nos. 1 and 2 were appointed as Assistant Teachers. They belong to non B.C. category. Petitioner Nos. 3, 4 and 5 have been appointed as Shikshan Sevaks. The Petitioner No. 3 belongs to O.B.C. The Petitioner Nos. 4 and 5 to N.B.C. Their appointments were approved. Subsequently the approval was cancelled. They approached this court and the matter was remanded back for consideration. On remand, the Deputy Director of Education for the reasons set out in his order has rejected the case of the Petitioners for being treated as regularly appointed Assistant Teachers/Shikshan Sevaks.

2. The Petitioners in Ground (c) have raised the following contentions :

"The Petitioners submit that the college has a total of 39 teachers which includes the Petitioners. 16 of these teachers including one of the Petitioners belong to the reserved category. Reservation quota required to be maintained is 34%. Therefore, 13 are required to belong to reserved category out of the 39 teachers. AT present however, there are 16 teachers from the reserved category and therefore, the quota is complete."

Another ground raised is ground (h) as under :

"The Deputy Director ought to have taken serious note of the fact that in respect of a colleague of the Petitioners namely one Mrs. A.A. Tipinis who was appointed in the same year as some of the Petitioners, has been granted approval despite her belonging to open category."

. Though on behalf of the State Respondent Mr. P. Mali, Education Officer (Secondary) Zilla Parishad, Thane has filed affidavit, this aspect of the

matter has not been dealt with either by him or Deputy Director of Education, Nashik Division, Nashik.

3. It appears that the authority has proceeded on the footing that what has to be applied is Government G.R. in the matter of reservations. The G.R. is nothing but administrative instructions which will be applicable, if there is no primary or secondary legislation in force. In the instant case, under the M.E.P.S. Act, rules have been framed. Rule 9(7) provides that the Management shall reserve 34 % of the total number of posts of the teaching as well as non teaching staff for the members of S.C., S.T. and backward communities. In other words it is clear that rules in force being subordinate legislation are applicable. The issue is whether the G.R.s will prevail over the rules. G.R.s are issued pursuant to the executive powers of the State as provided by Article 162 of the Constitution of India. The rules are framed pursuant to delegation of powers by the Legislature on the delegate. The rule making power is subject to Legislative control. Rules are subordinate legislation whereas administrative instructions are not. Administrative instructions cannot contravene the

rules. See Nanjundappa R.N. Vs. Themmiiah T. (1972) 1 S.C.C. 409. The rules therefore, will prevail over the G.R.

4. The authorities under the M.E.P.S. Act to follow strictly Rule 9(7) of M.E.P.S. Rules in so far as recruitment to the posts governed by the M.E.P.S. Act and rules. The G.R.s as issued by the Government from time to time in the exercise of its administrative powers under Article 162 of the Constitution of India would be inapplicable to appointments in schools and junior colleges.

. Consequently if the contentions raised in ground (c) are considered, the Petitioners are right and the Petitioners can be posted against the posts presently held by them. Considering that and as the issue has not been answered, petition will have to be partly allowed.

5. Rule made absolute in terms of Prayer Clause (a). The matter is remanded back to the Respondent No. 3. Respondent No. 3 after rehearing the petitioners and the Management as also the department to pass fresh orders according to law, not later than four months from today. The order

passed shall not be given effect if adverse to the
Petitioners for the period of eight weeks from the
date of receipt of communication. Till such time
the services of the Petitioners will not be
discontinued. Rule made absolute accordingly. No
order as to costs.

(F.I. REBELLO,J.)

(S.P. KUKDAY,J.)